

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE FIFTH DAY OF OCTOBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MS JUSTICE G.ROHINI

WRIT PETITION NO : 17919 of 2004

Between:

M/s Engineering Projects (India) Limited, (A Government of India
Enterprise), 103, Vamshi Residency, Yousufguda Check Post, Hyderabad –
500 045, rep. by its General Manager.

..... PETITIONER

AND

- 1 M/s Singareni Collieries Company Ltd, rep. by its General Manager
(Purchase), Kothagudem, Khammam District.
- 2 Sri Suresh, M/s Singareni Collieries Company Limited, Kothagudem,
Khammam District.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue an appropriate writ or order or direction more particularly one in the nature of Writ of Mandamus declaring the action of the 1st Respondent herein in terminating the contract awarded vide Order No., KOC78 dated 19-1-2004 vide impugned proceedings No. CRP/CMC/EXC/EN0 419/2003/8775 dated 1-10-2004 as arbitrary and unreasonable, offending Article 14 of the Constitution of India and for a consequential direction to the 1st Respondent to permit the Petitioner to discharge/perform the contract as awarded on 19-1-2004.

Counsel for the Petitioner : MR. D.V.SITARAMAMURTHY

Counsel for the Respondents : Mr. K.Srinivasa Murthy, Standing Counsel

The Court made the following :

THE HON'BLE MS. JUSTICE G.ROHINI

WRIT PETITION NO.17919 OF 2004

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ORDER:

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Heard the learned Counsel for the petitioner as well as the learned Standing Counsel appearing for the first respondent and perused the material on record.

This writ petition is filed seeking a declaration that the action of the 1st respondent in terminating the contract awarded in favour of the petitioner vide impugned proceedings dated 01-10-2004 as arbitrary and unreasonable offending Article 14 of the Constitution of India and for a consequential direction to permit the petitioner to perform the contract as awarded on 19-01-2004.

The petitioner claims to be a Company registered under the Companies Act, 1956 and wholly owned Government of India Public Sector Enterprise. In response to the

tender notification dated 10-09-2003 issued by the first respondent – M/s. Singareni Collieries Company Limited inviting tenders for Blast Hole Drilling, Blasting, Excavation, Loading, Transportation, Dumping etc., of Over Burden at Gowthamkhani Opencast Project, Kothagudem, the petitioner submitted its offer and the same was accepted and a letter of intent was issued in favour of the petitioner. In pursuance thereof, vide 1st respondent's letter dated 19-01-2004 the Work Order was issued to the petitioner for execution of the work as per the terms and conditions specified thereunder.

As can be seen from the material on record though the total duration of the contract is 36 months, under clause-8 of the Work Order a detailed month-wise work completion schedule has been prescribed. It is not in dispute that the petitioner was handed over the site on 13-03-2004. While so, the petitioner was served with a show-cause notice dated 24-09-2004 issued by the first respondent stating that since the date of commencement of the work, the performance was very poor and that as against the mutually agreed scheduled quantity of 47.60 LBCM, the achievement was only about 8.70 LBCM (18%) and that the performance as against the latest commitment of the petitioner was only about 31% and that the continuous poor performance was causing serious concern to the first respondent Company as it will have adverse impact on achieving the coal targets set for the project. Accordingly, the petitioner was called upon to explain on or before 30-09-2004 as to why action should not be taken including termination of the order placed on the petitioner duly imposing penalties as per the terms of the Work Order. The petitioner states that the said show-cause notice was received by it only on 27-09-2004 and immediately thereafter a detailed explanation was submitted on 30-09-2004 bringing to light the various aspects connected with the matter including the progress obtained during the later stages in executing the contract and requesting the first respondent not to take any precipitous action affecting the public interest. However, the impugned proceedings dated 1-10-2004 have been issued by the first respondent terminating the Work Order dated 19-01-2004 with immediate effect. In the said proceedings, it is stated that the explanation offered by the petitioner was found to be not satisfactory since it is nothing but reiterating the earlier promises with excuses and that despite several assurances given in the past, the performance of the petitioner continues to be very poor and that the continuous poor performance

will have adverse impact on achieving the coal targets set for the project. The said action of the first respondent in terminating the Work Order in favour of the petitioner by proceedings dated 1-10-2004 is under challenge in this writ petition.

At the outset, it is to be noted that the Work Order deals with the scope and nature of the work, quantities and value of the work, work completion schedule, payment terms, rates of payment, penalty for delay in works apart from other conditions with regard to security deposits, forfeiture of deposits. It also provides for termination of work in case the progress of work is not satisfactory or if it is found essential to expedite the works. Thus, it is clear that all the rights and liabilities of the parties are regulated by the terms and conditions specified in the Work Order itself. It is not in dispute that a specific work completion schedule has been prescribed under the Work Order and as per Clause-2 (4) the first respondent Company reserved the right to terminate the contract in case the progress is not satisfactory and if it is found essential to expedite the works. Obviously, the impugned proceedings of termination have been passed invoking the said clause. Thus, the issue raised by the petitioner with regard to the validity of the termination of contract is essentially founded on a dispute between the parties pursuant to the contract entered in between them and the same is not amenable to writ jurisdiction.

However, the contention of the learned Counsel for the petitioner is that the impugned action of the respondents in terminating the contract is manifestly arbitrary and unfair and it is vitiated by consideration of factors extraneous to the material on record and therefore it is a matter where the interference of this Court in exercise of jurisdiction under Article 226 of the Constitution of India is permissible. In support of his contention, the learned Counsel for the petitioner has placed reliance upon the decisions in ABL INTERNATIONAL LTD. v. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD., ONKAR LAL BAJAJ v. UNION OF INDIA and DUTTA ASSOCIATES PVT. LTD. v. INDO MERCHANTILES PVT. LTD..

As can be seen from the affidavit filed in support of the writ petition, the case of the petitioner is that the first respondent failed to discharge its part of the contractual obligation since it failed to disclose in full extent the particulars of the

haphazard and dangerous nature of the mine on which the work in question has been turned out.

It is also alleged that in the month of July, 2004, the first respondent has floated a limited tender enquiry circulated to the select local private contractors to elicit their bids for carrying out the work awarded to the petitioner. The petitioner contends that the said action of the first respondent was in violation of the guidelines issued by the Central Vigilance Commission in regard to the award of contract by the Public Sector Undertakings involving high value contracts. It is also alleged that in spite of repeated representations made by the petitioner, the first respondent failed to release the payments on time in accordance with the stipulation under Clause-2 of the Annexure-A of the Work Order which had its direct impact on the progress of work. The further contention is that whereas the duration of the contract is 36 months, the fact that the first respondent issued the impugned order within an year on the ground of unsatisfactory work shows that the pre-disposed bent of mind to terminate the contract at the first available opportunity. It is also contended that since under the terms of the contract there is a clause for imposing penalty for delay in works, there is absolutely no reason to resorting to the extreme step for termination of the contract.

It is also contended that whereas the petitioner submitted the explanation on 30-09-2004, the impugned order of termination was passed on the very next day itself i.e., on 1-10-2004 restating the cause shown in the notice which shows the total non-application of mind to the explanation submitted by the petitioner.

On the basis of the said pleadings, the learned Counsel for the petitioner contends that the conduct of the first respondent is not only vitiated by arbitrary exercise of power but it is also actuated by mala fides.

I am unable to agree with the said contention of the learned Counsel. All the allegations made by the petitioner even if established, would amount to breach of terms and conditions of the contract, but cannot be termed as 'arbitrary exercise of

power'. Thus, the relief sought in this writ petition is nothing but enforcement of terms and conditions under the contract. Nothing has been placed before this Court to show that the matter involves enforcement of any statutory right and that the contract has been entered into between the parties in exercise of any statutory power. The law is well settled that in a case of concluded contract voluntarily entered into between the parties and particularly where the conditions were not regulated by any statute as such, the obligations which arise out of such contract cannot be dealt with under Article 226 of the Constitution of India except where the decision making process is found to be vitiated by mala fides, unreasonableness and arbitrariness.

May be that the impugned order of termination was passed on the very next day of the receipt of the explanation from the petitioner. However, the same being a speaking order it cannot be held to be made without application of mind to the relevant factors merely on the ground that it was passed expediently. I am also unable to hold that the impugned action is vitiated by mala fides on the basis of vague allegations made in the affidavit.

As already expressed above, there is a specific clause under the work order dated 19-01-2004 for termination of the contract in case the progress of work is found to be unsatisfactory or it is found essential to expedite the works. The case of the first respondent is that the performance of the petitioner continues to be very poor in spite of several opportunities afforded in the past and that the continuous poor performance will have adverse impact on achieving the coal targets. In the circumstances, it cannot be said that the action of the first respondent in invoking the said clause and terminating the contract is arbitrary exercise of power.

For the aforesaid reasons, it cannot be held that the action of the 1st respondent is vitiated by mala fides, arbitrariness or unreasonableness. Hence, it is not open to the petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

Accordingly, while granting leave and liberty to the petitioner to work out the appropriate remedy as available under law, the Writ Petition is dismissed. No costs.

It is made clear that in the event of the petitioner pursuing any other remedy such proceedings shall be decided in accordance with law uninfluenced by any findings or observations made by this Court in this order.

5th October, 2004.

Note:- Issue cc by 06-10-2004.

(B/O)

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To

1 The General Manager (purchase) M/s Singareni Collieries Company
Ltd, Kothagudem, Khammam District.

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